SUPREME COURT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 174

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT, *Petitioners,*

v.

STATE OF FLORIDA, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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v.

STATE OF FLORIDA, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The order of the Supreme Court of Florida denying petition for writ of certiorari dated January 31, 1967 is attached hereto as Exhibit A. Petition for rehearing in the same court was denied February 23, 1967. The opinion of the District Court of Appeal, Third District of Florida, which petitioners sought to have the Supreme Court of Florida review on certiorari is reported at 191 So.2d 84.

JURISDICTION

The order of the Supreme Court of Florida was entered on January 31, 1967. The petition for writ of certiorari was filed on May 19, 1967, and respondent was directed to file a response thereto by letter dated October 10, 1967. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

We believe that the question to be determined by this Court is properly stated as follows:

WHETHER THE ADMISSION IN EVIDENCE OF TAPE RECORDINGS OF TELEPHONE CONVERSATIONS ON A PARTY LINE VIOLATED PETITIONERS' RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT

The factual situation out of which these proceedings arose as reflected by the testimony adduced at the trial can be briefly outlined.

Donald Brown, an installer-repairman for the Winter Park Telephone Company, testified that he installed the telephone at the residence which the police used (Tt. V, p. 553). Brown related there was no special action taken with regard to the hooking up of the telephone (Tt. V, pp. 554-566). The telephone was on a four-party line and Brown testified that there was no

recording device hooked to the telephone when he installed it (Tt. V, p. 569). It will be noted that this telephone was installed on July 26, 1963.

The telephone which was installed on July 19, 1963, at the house which was occupied by the petitioners, was put in by one James D. Wheaton, who was an installer-repairman for the Winter Park Telephone Company. When Wheaton installed the telephone, he informed a person he later identified at the trial as petitioner Lee, that he was installing an R-4 (four-party line) instead of an R-1 (private line) (Tt. V, p. 542). Wheaton's testimony revealed that the installation of the party line was done in a routine manner (Tt. V, p. 541). Mr. Wheaton testified unequivocally that he informed Lee that the only line available was an R-4, or four-party line (Tt. V, pp. 544-549), and there was no contradictory testimony from petitioners.

Mr. Martin Nold, assignments supervisor for the Winter Park Telephone Company, testified that the telephones located at the residence of the petitioners and at the house rented by the police were both on the same party line (Tt. VI, p. 575). Nold testified that there were no private lines available in the area (Tt. VI, p. 577). Nold testified that he received verbal orders to try to put the telephone at 221 Manor Road (occupied by the police) on the same line with the telephone in the house which was occupied by the petitioners (Tt. VI, p. 578). Nold said, however, that it was coincidental that the telephone requested by the police was placed on the same party line with petitioners (Tt. VI, p. 584).

SUMMARY OF ARGUMENT

A. The order of the Florida Supreme Court is based upon

an adequate and independent non-federal ground and sufficiently so to support the judgment.

B. The Federal Communications Act (47 U.S.C., Section 605) is not applicable to proceedings in state courts. *Schwartz* v. *Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232.

C. The action of the state officers in listening in on a party line telephone conversation does not constitute an *interception* within the meaning and intendment of Section 605 of the Federal Communications Act. *Rathbun* v. *United States*, 355 U.S. 107, 2 L.Ed. 2d 134, 78 S.Ct. 161.

D. The state officers committed no trespass. There was no electronic surveillance to overhear conversations taking place within a "constitutionally protected area" see, e.g., *Silverman* v. *United States*, 365 U.S. 505, 510. The state officers did nothing more than what they had a right to do by picking up the receiver of a telephone installed at the premises rented by them and listening to a party line telephone conversation.

E. The dictates of common sense compel the conclusion that a telephone party line is not a "constitutionally protected area." Petitioners, by choosing to place calls from a party line telephone ran the risk that their words might be overheard by someone whose telephone was connected to the same party line. We say there is little, if any, basis for even suggesting that the degree of privacy which petitioners could reasonably expect to enjoy in a party line telephone conversation was comparable to that which they could expect (and demand) on a private line. See *Smayda* v. *United States*, 353 F.2d 251, 254-256 (C.A. 9) certiorari denied 382 U.S. 981.

ARGUMENT

WHETHER THE ADMISSION IN EVIDENCE OF TAPE RECORDINGS OF TELEPHONE CONVERSATIONS ON A PARTY LINE, VIOLATED PETITIONERS' RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Reasons for Declining to Grant the Writ of Certiorari Prayed for by Petitioners

There can be no doubt but that this Court has long followed its self-imposed principle that it will decline to review the judgment of a state court when said judgment is based upon an adequate and independent non-federal ground—without regard to whether a federal question was involved. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U.S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U.S. 207.

Just as certain is it correct to say that once it has been made apparent that the state court judgment in question is in fact based upon a non-federal ground, this Court must then determine whether that ground was in fact adequate to support the judgment without regard to any conclusion of the federal question which may have been involved. *Staub* v. *Baxley*, 355 U.S. 313, 318-319; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 455.

The adequacy referred to above is met if said ground is (a) broad enough, (b) independent and (c) tenable.

The matter of the scope of the non-federal ground is dis-

cussed in the *Murdock* case, supra, and as well in *Eustis* v. *Bolles*, 150 U.S. 361, 370.

The independence of said non-federal ground is discussed extensively in the cases of *Enterprise Irrig. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 164; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290.

In the case at bar, respondent vigorously contends that the action of the Florida Supreme Court sought to be assailed by petitioners was in every way based upon a non-federal ground, which ground was independent of any federal question, was broad enough without reference to the federal question and was so tenable as to almost require this Court to conclude that said ground was adequate and therefore decline to grant review thereof.

In accord with the above, this Court has consistently held that it is essential to show that not only must the state court's decision rest on a federal question, but it must also appear that a decision as to such question was necessary to the state court's determination. *De Saussure* v. *Gaillard*, 127 U.S. 216, 8 S.Ct. 1053, 32 L.Ed. 125 and *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191. See also annotations in 100 L.Ed. 1200, 1203 and 84 L.Ed. 925, 935, et seq.

Quite apart from the fact that the decision of the Supreme Court of the State of Florida denying petitioners' review by certiorari in nowise turned on or was concerned with either a federal question or an issue of federally assured due process, even if it had been so colored, it is axiomatic that this would not *per se* constitute a valid basis upon which petitioners could now complain. In this regard, the Court's attention is invited to its own pronouncements anent this matter. *Pierce* v. *Somerset Rail-*

way, 171 U.S. 641, 19 S.Ct. 64, 43 L.Ed. 316, *Leonard* v. *Vicksburg, Shreveport and Pacific Railroad Company*, 198 U.S. 416, 25 S.Ct. 750, 49 L.Ed. 1108, *Utley* v. *City of St. Petersburg, Florida*, 292 U.S. 106, 54 S.Ct. 593, 78 L.Ed. 1155; *Lynch* v. *New York ex rel. Pierson*, supra; *Brooks* v. *Missouri*, 124 U.S. 394, 8 S.Ct. 443, 31 L.Ed. 454; *Buck* v. *California*, 343 U.S. 99, 72 S.Ct. 502, 96 L.Ed. 775. See also annotations, 100 L.Ed. 1200, 1203-6; 84 L.Ed. 925, 940, et seq.

The basic pronouncements to be found in the immediately aforementioned decisions of this Court were brought forth and galvanized in the realm of criminal law by this Court's own recent decision in the case of *Durley* v. *Mayo*, 351 U.S. 277, 100 L.Ed. 1178, 76 S.Ct. 806, in which it concluded that the Florida Supreme Court, in denying the petitioner relief by habeas corpus, rested its decision on adequate state grounds; they being respectively statutory *res adjudicata* (Section 79.10, Florida Statutes) and substantive or case law *res adjudicata* (*Washington* v. *Mayo*, Fla. 77 So.2d 620, 621).

Nor need this Court consider that the Supreme Court of Florida might have rested its order of dismissal on an adequate state ground as was the case in *Durley* v. *Mayo*, supra. It may be categorically stated and respondent so does, that the order of the Supreme Court of Florida in question was in fact founded upon state grounds which are conclusively adequate.

In the instant proceedings, we need only concern ourselves with what is the highest form of law to which one can turn in the State of Florida; a constitutional provision, to wit: Article V, Section 4(2), the pertinent provisions of which read as follows:

"Section 4. Supreme Court

* * *

"(2) Jurisdiction

* * *

". . . The supreme court may review by certiorari any decision of a District Court of Appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the District Court of Appeal to be of great public interest, or that is in direct conflict with a decision of another District Court of Appeal or of the supreme court on the same point of law, . . ."

So it was that petitioners were faced with the constitutional requirement impressed upon them that required a specific assertion that either of the enumerated prerequisites occurred, supported by record evidence thereof, in order to secure review in the Florida Supreme Court by certiorari.

It should be clear that the decision of the District Court of Appeal of Florida, Fourth District, which petitioners sought to have reviewed by the Florida Supreme Court did not affect a class of constitutional or state officers. It should be equally clear that said decision did not pass upon a question certified by said District Court of Appeal to be of great public interest. Petitioners, however, did attempt to invoke the jurisdiction of the Florida Supreme Court by alleging that the decision of the Florida District Court of Appeal, Fourth District, in the case *sub judice* was in direct conflict with the decision of another District Court of Appeal. However, the Florida Supreme Court by entry of its order dated January 31, 1967, denying petition for writ of certiorari said, in effect, that it did not have jurisdiction to review the decision of the said District Court of Appeal by certiorari.

In view of the foregoing, it becomes apparent that the order of the Florida Supreme Court that petitioners seek to have this Court review was indeed based upon the adequate and independent non-federal ground, to wit: lack of jurisdiction.

The law of wire tapping in Florida was most thoroughly and clearly set forth in the opinion of the Florida District Court of Appeal, First District, in the case of *Griffith* v. *State*, Fla. App. 1959, 111 So.2d 282, which was later followed and re-affirmed in *Barber* v. *State*, Fla. App. 1965, 172 So.2d 857. The Florida Supreme Court denied certiorari in both of these cases.

In the *Griffith* case, supra, it was pointed out that although there were no state or federal statutes applicable in Florida which would make wire tapping illegal, that wire tapping is illegal in Florida because it violates Sections 12 and 22 of the Declaration of Rights of the Florida Constitution, which provide:

> "Section 12 . . . No person shall be . . . compelled in any criminal case to be a witness against himself . . ."

> "Section 22 . . . The right of the people to be secure in their persons, house, papers and effects against unreasonable seizures and searches, shall not be violated . . ."

Certainly the holding in the *Griffith* case, supra, that there was no federal statute applicable in Florida which would make wire tapping illegal is in harmony with previous pronouncements of

this Court. We refer particularly to the holding of this Court in *Schwartz* v. *Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232. There the petitioner contended that Section 605 of the Federal Communications Act, (47 U.S.C. Section 605) rendered inadmissible in evidence the records of intercepted telephone conversations without petitioner's consent. This Court recognized that it was dealing only with the application of a federal statute to state proceedings and held as follows:

> "We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings . . ."

We believe that this Court's holding as above set forth is controlling and, therefore, obviates the necessity of determining whether or not there was an "interception" within the meaning of Section 605 of the Federal Communications Act.

Petitioners seem to be of the opinion that this Court's decision in *Benanti* v. *United States*, 355 U.S. 96, 2 L.Ed. 2d 126, 78 S.Ct. 155, supports their contention that the Federal Communications Act (47 U.S.C. Section 605) is applicable to state court proceedings. We do not so read the case. In *Benanti*, this Court simply held that information obtained and divulged by state agents in violation of Section 605 of the Federal Communications Act is inadmissible in federal court. Obviously, this Court had to first determine whether or not there had been a violation of the Federal Communications Act before being able to rule on the admissibility of the information sought to be introduced in evidence in federal court. We cannot understand how this holding can be construed as making the Federal Communications Act applicable to state court proceedings.

But should this Court seek to determine whether the state agents violated Section 605 of the Federal Communications Act in the case *sub judice*, the case of *Rathbun* v. *United States*, 355 U.S. 107, 2 L.Ed. 2d 134, 78 S.Ct. 161, is informative. In *Rathbun*, the petitioner telephoned one Sparks in the early morning hours and two police officers at Sparks' direction listened to the conversation over a telephone extension in another room of Sparks' home. The only issue before this Court was whether there had been an unauthorized interception within the meaning of Section 605 of the Federal Communications Act. This Court stated:

> "We hold that Section 605 was not violated in the case before us because there has been no 'interception' as Congress intended that the word be used."

In determining what constitutes an illegal wire tap, this Court's pronouncement in *Goldman* v. *United States* (1942), 316 U.S. 129, 86 L.Ed. 1322, 62 S.Ct. 993, is helpful. There the defendant contended that improper evidence obtained in violation of the Federal Communications Act had been admitted during his trial. It appeared that federal agents had obtained access to an office adjoining the defendant's office, and had by means of a detectaphone overheard conversations between the defendant and others, and had also overheard what defendant said while speaking into the office telephone. This Court held that the divulgence of what defendant had said into the telephone receiver did not constitute an "interception" within the meaning of the Federal Communications Act, since that statute protected the message itself throughout the course of its transmission, and words spoken in a room in the presence of another into a telephone receiver did not constitute a "wire communication" within the meaning of the statute. This Court said that the term "intercept" indicated the taking or seizing by the way

or before arrival at the destined place, and that it did not ordinarily connote the obtaining of what was to be sent before, or at the moment, it left the possession of the proposed sender; or after, *or at the moment, it came into the possession of the intended receiver.* And so it is in the case *sub judice* that the state officers listening in on a party line conversation on a telephone installed in premises rented by them obtained the information *at the moment it came into the possession of the intended receiver.* We note that the *Goldman* and *Rathbun* cases were cited with approval by this Court in the case of *Lopez* v. *United States,* 373 U.S. 427, 10 L.Ed. 2d 462, 83 S.Ct. 1381.

We believe the *Goldman* decision to be authority for the proposition that a trespass, either of an eavesdropper or an eavesdropping device is necessary to constitute a violation of the Fourth Amendment to the United States Constitution. E.g., *United States* v. *Pardo-Bolland,* 348 F.2d 316 (C.A. 2), certiorari denied, 382 U.S. 944; *Anspach* v. *United States,* 305 F.2d 48 (C.A. 10), certiorari denied, 371 U.S. 826; *Jones* v. *United States,* 339 F.2d 419 (C.A. 5), certiorari denied, 381 U.S. 915. We recognize, however, that the *Goldman* decision has been criticized as not providing an adequate means of dealing with problems arising from the use of electronic equipment such as the "parabolic microphone which can pick up a conversation 300 yards away," *Silverman* v. *United States,* 365 U.S. 505, 5 L.Ed. 2d 734, 81 S.Ct. 679; *Lopez* v. *United States,* 373 U.S. 427, 468 n. 16 (Brennan, J., dissenting), and that the Court may, therefore, wish to reconsider the validity of the *Goldman* decision. But assuming that *Goldman* should be modified where electronic surveillance is used to overhear conversations taking place within a "constitutionally protected area" see, e.g., *Silverman* v. *United States,* 365 U.S. 505, 510, we question whether a telephone party line (petitioners having knowledge of this fact) is a "constitutionally protected area."

The rights of privacy reflected in the guarantees of the Fourth Amendment must be measured in terms of the reasonable expectations of a person in a given location that he is free from scrutiny. Thus a field and a public street are normally not places where a man may legitimately anticipate that he will not be observed. *Hester* v. *United States*, 265 U.S. 57, 59; see *Lopez* v. *United States*, 373 U.S. 427, 466 n. 12 (Brennan, J., dissenting). Thus, measured in terms of reasonable expectations, we submit that a telephone party line is not significantly different.

Although questions as to whether the use of telephone instruments or other telephone equipment to overhear private conversations amounts to an invasion of privacy usually arise in connection with the use of wire taps, that is, mechanical devices physically attached to telephone wires, the problem can arise in relation to the use of telephone extension, or other telephonic equipment which does not involve actual wire tapping. There is little authority on the question whether use of telephonic equipment, apart from wire tapping, can support a claimed invasion of privacy. What authority there is tends to answer the question negatively. *Schmukler* v. *Ohio-Bell Tel. Co.*, (1953 CP) 66 Ohio L Abs 213, 116 NE 2d 819; *La Crone* v. *Ohio Bell Tel. Co.* (1961), 114 Ohio App. 299, 19 Ohio Ops 2d 236, 182 N.E. 2d 15.

We think the case of *Williams* v. *State*, 109 So.2d 379, to be persuasive. In *Williams*, a room was rented from the appellant next to his juke joint. The rental was made on behalf of the Sheriff, but appellant was told that some colored people were to be put in. Appellant had no knowledge that law enforcement officers were in any way connected with the rental. Appellant's telephone in his building was on a party line, which was the only line maintained by the telephone company in that

area. A telephone was installed in the rented premises by the telephone company, which was, by necessity, on the same party line as that of appellant. The evidence showed that the appellant was aware of this installation. Through the use of this party line telephone, a deputy sheriff overheard and recorded the conversations which appellant contends were erroneously admitted in evidence. On appeal, the Florida District Court of Appeal, Second District, held that Section 605 of the Federal Communications Act was not applicable to proceedings in state courts, citing *Schwartz* v. *Texas,* supra, as authority. And it is interesting to note that this point was conceded by appellant in his reply brief. Appellant also contended that the admission in evidence of the conversations in question was prohibited by Section 822.10, Florida Statutes, 1967. In answering this contention, the court had this to say:

> ". . . It must be kept in mind that the telephone installation used by the witnesses, whose testimony is sought to be excluded, was made by the telephone company in the regular course of business. Certainly it cannot be argued that a subscriber to service on a party line is the owner of the line, and that any one else seeking like service must first secure his permission before being entitled to a telephone. In breaking the Statute down to specific points, we find that it provides punishment to 'whoever, without the consent of the owner thereof * * * connects, directly or indirectly, by wire or any other means whatsoever, to or with any * * * telephone line so as to hear, or be in a position to hear, *or to enable any other person to hear or be in a position to hear,* for any use or purpose whatsoever * * *.' If the appellant were the owner of the party line, as he contends, then the telephone company itself violated the law by installing another phone without his consent. In other words, a subscriber on a party line would

be able to block any additional phone installations thereon by withholding his consent. We do not think any further discussion of this contention is necessary. Appellant was not the owner of the party line, and the quoted Statute has no application in the present case . . ." (Emphasis theirs)

We believe, as this Court said in *Rathbun*, that the purpose of the Federal Communications Act was to protect the privacy of telephone conversations against interference with the *means* of communication, but that the statute defined no duties of the communicants to each other in relation to messages received by wire, and that there was no prohibition against the disclosure of a message by either party to the conversation and no proscription against the disclosure of a conversation by a third party who had listened to it through regular channels of reception with the permission of the recipient of the message. The protection intended and afforded by said statute is of the *means of communication and not the secrecy of the communication.* This Court pointed out that telephone conversations had not been raised to the status of privileged communications as that doctrine was recognized in the law of evidence.

Although *Rathbun* v. *United States*, supra, involved the admissibility in evidence of the contents of a communication overheard on a regularly used telephone extension with the consent of one party to the conversation, we direct this Court's attention to the following language which closes the opinion:

"Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no

violation of any privacy of which the parties may complain."

We believe the corollary to be inescapable that one who knowingly uses a party line telephone is put upon notice that his conversation is likely to be overheard. It is of no consequence that petitioner Lee had ordered a private line, because the record clearly reflects that he was on notice that a party line had been installed at the residence. We urge, therefore, that the police officers in the instant case did nothing more than what they had a right to do.

So it is then that under the pronouncements of this Court there was no "interception" within the meaning of the Federal Communications Act, no trespass, no invasion of privacy and no violation of any state law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
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WALLACE E. ALLBRITTON
Assistant Attorney General

Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Florida to the Honorable Edward R. Kirkland, of Kirkland, Johnson & Blalock, Suite 104, 22 W. Lake Beauty Drive, Orlando, Florida, attorney for petitioners, by mail, this ..... day of November, 1967.

WALLACE E. ALLBRITTON
Assistant Attorney General

Of Counsel for the Respondent.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
TUESDAY, JANUARY 31, 1967

CLYDE FRANKLIN LEE, ET AL.,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 35,888

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Fourth District of Florida, in said cause bearing date September 21, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

cc: Honorable Thomas Thatcher
Honorable Charles E. Limpus
Messrs. Kirkland, Johnson & Blalock
Honorable William D. Roth

Exhibit A